

No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS,
LOCAL UNION No. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

Reply Brief for Intervenor and Charging Party,
Reynolds Electrical & Engineering Co., Inc.

FILED

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The basic issues in this case are: (i) whether the National Labor Relations Board had jurisdiction under Section 10(k) of the National Labor Relations Act to hear and determine the jurisdictional dispute and to find that the Respondent had violated Section 8(b)(4)(D) of the Act; (ii) whether the Board is precluded from prosecuting unfair labor practices occurring after the filing of the Charge; and (iii) whether the Board's issuance of a "Broad Form" Cease and Desist Order was justified.

REECO believes that its Opening Brief adequately set forth the considerations which should persuade the Court to enforce the Order issued by the Board. Never-

theless, the failure of Respondent in its Opening Brief to make any effort to distinguish between substantively distinct arguments or to separate fact from hypothesis in connection with the Section 10(k) issue necessitates some further response by REECO on this question.

The Board's Jurisdiction.

In asserting that the Board was without jurisdiction to enter the Order for which enforcement is sought in this Court, Respondent raises what may be considered essentially four arguments:

1. That the Carter-Leigon Agreement rendered the Board without jurisdiction to proceed under Section 10(k) of the Act;
2. That the filing of the Nevada Federal District Court action to enforce an arbitration award rendered pursuant to the Collective Bargaining Agreement between Respondent and REECO deprived the Board of any jurisdiction to proceed under Section 10(k) of the Act;
3. That the parties "adjusted" or "agreed upon methods for the voluntary adjustment" of the jurisdictional dispute pursuant to the provisions of Section 10(k) thus rendering the Board without jurisdiction to proceed under this Section; and
4. That the Section 10(k) proceeding was not ripe for Board consideration since no jurisdictional dispute could exist under Section 8(b)(4)(D) until and unless the Nevada Federal District Court concluded that Respondent did not have a contractual right to the work claimed.

A. The Carter-Leigon Agreement.

Respondent expended almost all of the space devoted to its Statement of the Case and a good portion of its jurisdictional argument in an attempt to highlight the Carter-Leigon Agreement and to stress the Agreement's importance in the present enforcement proceeding. For all of its effort, Respondent has failed to demonstrate the relevance of the Carter-Leigon Agreement either factually or legally to the issue before this Court.

The record does not support the contentions of Respondent as to the factual impact of the Carter-Leigon Agreement upon the jurisdictional dispute which arose at the Nevada Test Site in early 1964. The Carter-Leigon Agreement was executed by the Electricians' Union and Respondent Teamsters on February 29, 1952 to resolve a then extant jurisdictional dispute concerning specific permanent warehousing facilities then in use at the Nevada Test Site [T. Ex. 6A; R. 21; Tr. 1035-1037, 1693-1694, 2307, 2319-2320]. With the advent of underground testing in 1961 at the conclusion of the three-year unilateral moratorium on nuclear testing [Tr. 570, 441] an expanded system for the processing of construction and support work in the forward areas was instituted [Tr. 343-349]. The permanent warehouses of the type existing in 1952 and with respect to which the Carter-Leigon Agreement was executed are still being employed at the Nevada Test Site and are staffed and operated by personnel of Respondent [Tr. 901-908, 935, 936].

The advent of underground testing, however, necessitated the formation of a number of forward "compounds" or "staging areas" to facilitate the work in each of a number of testing areas [Tr. 343-349]. The

the Board has jurisdiction to interpret and apply contracts of this nature in connection with unfair labor practice charges and that the preemption argument is not available to remove this jurisdiction. [REECO Br. 17-19].

N.L.R.B. v. C. & C. Plywood Corp. (1967),
385 U.S. 421;

N.L.R.B. v. Acme Industrial Co. (1967), 385
U.S. 432.

Once this Court determines that the existence of the Carter-Leigon Agreement and the filing of a Section 301(a) suit based thereon does not remove the Board's jurisdiction of Charges which had been filed with it, the Carter-Leigon Agreement is without further significance in this proceeding. The Nevada Federal District Court properly stayed the proceedings before it in recognition of the Board's primary jurisdiction [G.C. Ex. 6F; REECO Br. 13, 14-17]. The Board considered and rejected Respondent's contention that the Carter-Leigon Agreement applied to the jurisdictional dispute and granted the work in question to the Teamsters [R. 78-79]. Respondent at no time either before the Board [R. 12] or before this Court [R. 61 *et seq.*] has questioned the adequacy of the evidence to support the Board's findings. As a result, a finding of no preemption disposes of all objections to enforcement of the Order based upon the Carter-Leigon Agreement.

B. Nevada Federal District Court Action.

On May 5, 1964, REECO filed the Charge with the Board which gave rise to this case [R. 3]. Subsequently, on May 11, 1964, REECO filed an Amended Charge. Thereafter, on May 21, 1964, Respondent filed its action with the Nevada Federal District Court

[G.C. Ex. 6A-6F]. The Nevada Federal District Court suit sought enforcement of an arbitration award arising under the Collective Bargaining Agreement between Respondent and REECO [T. Ex. 5, 13, 14, 15; G.C. Ex. 6A-6F]. The Electricians' Union was not a party to that Collective Bargaining Agreement and in fact had secured its own arbitration award conflicting with that obtained by Respondent pursuant to the Collective Bargaining Agreement between the Electricians' Union and REECO [IBEW Exs. 2A and 2B].

Respondent cites a number of general labor law decisions as indicating that a Federal District Court may compel arbitration of jurisdictional disputes under Section 301(a) [T. Br. 47-49]. What Respondent fails to point out is that these decisions did not involve the pre-emption issue being asserted by Respondent and in fact the *Carey v. Westinghouse Electric Corp.* (1962), 375 U.S. 261 decision relied upon by Respondent [T. Br. 48] contained additional pertinent language omitted in Respondent's brief:

“Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, *the Board's ruling would, of course, take precedence*; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301.

* * * * *

“*The superior authority of the Board may be invoked at anytime.* Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area” (Emphasis added).

Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272.

Again, in relying upon *Carey v. General Electric Corp.* (2nd Cir. 1963), 215 F. 2d 499 [T. Br. 48], Respondent again failed to refer to an extremely relevant portion of the Court's decision which is set out on pages 15-16 of REECO's brief.

These decisions then, recognize a concurrent jurisdiction of the federal district courts to compel arbitration of the work dispute question even though one union involved in the dispute is not a party to the Collective Bargaining Agreement. These decisions *do not* involve the question of preemption nor do they involve the situation where Section 8(b)(4)(D) actions have been taken to coerce a resolution of the jurisdictional dispute. The decisions *do* specifically recognize the preeminence, precedence and binding jurisdiction of the Board where activities covered by the Act are involved [See REECO Br. 14-17].

Respondent's preemption argument is therefore narrowed down to the decision in *Square D Company v. N.L.R.B.* (9th Cir. 1964), 332 F. 2d 360. The *Square D* decision is unavailable to Respondent for a number of reasons. First, it has effectively been overruled by two Supreme Court decisions [REECO Br. 18-19].

N.L.R.B. v. C & C Plywood Corp. (1967), 385 U.S. 421;

N.L.R.B. v. Acme Industrial Co. (1967), 385 U.S. 432.

Second, it involved a dispute between the two parties to a Collective Bargaining Agreement concerning matters

covered by that agreement. Here, the dispute is between two unions only one of which is a party to the Collective Bargaining Agreement which gave rise to the arbitration award of which enforcement was sought in the Section 301(a) proceeding. Moreover, the Collective Bargaining Agreement in question specifically precludes the resolution of jurisdictional disputes through the arbitration process [T. Ex. 5 (Section II, Sub-paragraph D); R. 35 n. 23]. Third, unlike the *Square D* situation, the present dispute involved extensive concerted activity on the part of Respondent to enforce its demand [REECO Br. 7]. Fourth, the most recent decisions in the Courts of Appeals including the Ninth Circuit have determined that preemption of the type asserted by Respondent is not available to deprive the Board of jurisdiction [REECO Br. 19-21].

See *American Fire Apparatus Company v. N.L.R.B.* (8th Cir. 1967), 380 F. 2d 1005; *N.L.R.B. v. Hutting Sash & Door Co., Inc.* (8th Cir. 1967), 377 F. 2d 964; *Honolulu Star-Bulletin, Inc.* (9th Cir. 1967), 372 F. 2d 691.

Fifth, in construing the requirements imposed upon the Board by Section 10(k), the Supreme Court in *N.L.R.B. v. Radio & Telev. Broadcast Eng. Union* (1961), 364 U.S. 573, specifically concluded that it is the obligation of the Board to hear and determine the merits of a jurisdictional dispute of the nature presented to it in the instant proceeding and which resulted in the Order for which enforcement

is presently being sought [N.L.R.B. Br. 20-21]. To adopt the position advanced by Respondent would ignore the very purpose of Section 10(k) and run contrary to the Supreme Court's decisions finding no preemption of the Board's jurisdiction under Section 301(a).

The Supreme Court has specifically ruled out the possibility of a preemption argument in connection with a Section 301(a) "contract" which does not contain any self-enforcing provisions, *i.e.*, the Carter-Leigon Agreement, and has apparently considered the presence of an arbitration provision, *i.e.*, REECO-Respondent and REECO-Electricians' Union Collective Bargaining Agreements, equally unpersuasive [REECO Br. 17-21]. Moreover, the Supreme Court in failing to accord any weight to the existence of an arbitration provision did so in a bi-partite situation. Here, Respondent is attempting to rely upon an arbitration award which did not bind the Electricians' Union and ran counter to the arbitration award obtained by the Electricians' Union under its Collective Bargaining Agreement which did not bind Respondent. This is precisely the situation where Section 10(k) was intended to apply and a situation in which preemption makes absolutely no sense.

C. Private Adjustment of Dispute.

Respondent argues that the Carter-Leigon Agreement constituted a private adjustment of the jurisdictional dispute within the provisions of Section 10(k) of the Act thereby depriving the Board of jurisdiction [T. Br. 41-43]. A simple reading of Section 10(k)

clearly establishes that the voluntary adjustment contemplated therein is one entered into by the parties to a jurisdictional dispute to resolve the specific dispute in question at the time of the dispute. The Section provides in relevant part:

“. . . [T]hat Board is empowered and directed to herein determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the *parties* to such dispute submit to the Board satisfactory evidence that *they have adjusted*, or agreed upon methods of voluntary adjustment of, the dispute. . . . [U]pon such voluntary adjustment of the dispute, such charge shall be dismissed.” (Emphasis added).

Section 10(k), 29 U.S.C. §168(k).

The voluntary settlement provision of Section 10(k) clearly does not apply to the 1952 Carter-Legion Agreement. The Electricians' Union at no time agreed to application of the Carter-Leigon Agreement to the presently disputed work.

D. Section 301(a) Suit as Prerequisite to Existence of Unfair Labor Practice.

Respondent argues that the jurisdictional dispute was not ripe for consideration by the Board in the absence of a finding by the Nevada Federal District Court of non-preemption [T. Br. 43, 49-50]. This argument is simply a restatement of Respondent's preemption argument based upon *Square D* and is unavailable to Respondent as has been discussed previously.

Conclusion.

For the reasons set forth in this Brief and in its Opening Brief, the Intervenor and Charging Party, Reynolds Electrical & Engineering Co., Inc., prays that this Court issue a decree enforcing in whole the Order of the National Labor Relations Board which is the subject of this Petition for Enforcement proceeding, and requiring Respondent, its officers, agents and representatives, to comply therewith.

Dated: May 23, 1968.

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM F. SPALDING

